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No. 87-7101

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANTHONY JAMES MANN,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE*
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

WILLIAM H. LUKER
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

*Counsel of Record

July, 1 1988

QUESTIONS PRESENTED

1. Did the photographs of the murder victim and the allegedly prejudicial comments of the prosecutor so undermine the reliability of the death sentencing process that the sentencing procedure failed to meet the requirements of the Eighth and the Fourteenth Amendments of the United States Constitution?

2. Under the facts of this case, did Due Process require the trial court to instruct the jury on the elements of the lesser offense of First Degree Manslaughter?

3. Did the trial court's definition of the "Especially Heinous, Atrocious or Cruel" aggravating circumstance sufficiently narrow the class of persons subject to the death sentence so as to avoid contravention of the Eighth and Fourteenth Amendments?

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Case No. 87-7101

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ANTHONY JAMES MANN,

Plaintiff,

v.

STATE OF OKLAHOMA,

Defendant.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Robert H. Henry, Attorney General of Oklahoma, respectfully submits this as the Response to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner, hereinafter referred to as Defendant, was tried and convicted of First Degree Murder in the District Court of Grady County, Oklahoma. He was sentenced to death and that sentence has been affirmed on appeal by the Oklahoma Court of Criminal Appeals in Mann v. State, 749 P.2d 1151 (Okla. Crim. App. 1988). The Oklahoma Court of Criminal Appeals summarized the case against the Defendant as follows:

> The victim, Charles Keene, was abducted and murdered in the early morning hours of January 23, 1983. His body was weighted with a heavy chain, fastened to a cement block and dropped in the Washita River. He had multiple contusions, cuts, including a slit in his throat and a broken leg. The cause of death, however, was attributed to two gun shot wounds, one in the head and one in the chest. At the time of Keene's death, he was staying with his ex-wife, Vickie Keene, and their two young children. He was abducted from her home on the night of his death.
>
> Four people were charged with the first degree malice aforethought murder of Keene; they were: William Wayne Thompson, Bobby Joe Glass, Richard Jones and appellant. Appellant was Keene's ex-wife's 27-year-old brother and Thompson was her 15-year-old half-brother. The other two defendants were friends of Mann and Thompson. The four defendants were tried separately; all of them were found guilty and given the death penalty. At the time of this trial, Glass had been killed in prison.

> The first witness called by the State was 15 year-old Thompson who was the self-proclaimed triggerman and planner in this case. It is from him that we get the story. Although divorced, Keene had been physically abusing his ex-wife, Vickie Keene. Mann and Thompson's plan on January 22 was to put a stop to the problem. Earlier that afternoon, Keene had chased appellant and Danny Mann, another brother, out of Vickie Keene's trailer house with a butcher knife. They had gone there with her to get her car. After this encounter, they went to see a deputy sheriff for help but were told nothing could be done. Tony Mann then gave his .45 caliber semi-automatic pistol, the murder weapon, to Vickie Keene so she could defend herself.
>
> Thompson had heard about this episode from his mother and had seen the loaded gun on the kitchen cabinet at his mother's house. Glass, Jones, Mann and another man were sitting around on that Saturday evening drinking, smoking marijuana and taking valiums when Thompson asked appellant if he could join them; Mann agreed. During the evening, Mann, as the leader, hatched the plan to run Keene off by beating him up and putting him out on the highway with instructions not to come back. Thompson claimed that unknown to Mann, he and Glass put a cement block and chain in the trunk of the car and got the gun from the kitchen to take with them. Thompson said he and Glass intended at that time to murder Keene and dispose of the body by submerging it in the Washita River. This was the plan that was carried out.
>
> Keene offered little resistance when they went to get him. Mann drove to the river with Glass and Thompson on either side of Keene in the back seat. Jones was passed out in the front seat. When they got to the river, Mann told Keene they were going to beat him up, he broke free and ran for the home of a Mr. and Mrs. Brown. A scuffle ensued and Thompson pulled out the gun. Keene, at 200 pounds, was substantially larger and stronger than Glass who was not large or Thompson who weighed only 115 pounds.
>
> So as Thompson put it, "I was going to even up the size so I got that .45 and he grabbed it." the gun went off and was knocked out of Thompson's hand. We find from the Browns' testimony, the shot awakened them. Keene ran up on the porch and yelled for them to call the sheriff that "they" were trying to kill him. In addition to the gun, one of the men had stick which was used to knock Keene out. The sheriff did not arrive before the badly beaten Keene was loaded unconscious

in the trunk of the car and driven to the second location on the river. That is where the actual murder took place and the body was dumped. Thompson thinks Glass had the stick and that Keene's leg was not broken until late, although he is not sure when that occurred.

Thompson went on to testify that Mann tried to stop on the highway to let Keene out and at that point he pulled the gun on Mann and directed him where to go. Thompson claims he asked Mann to help with the murder but he refused and walked up the road until it was over. Thompson and Glass drug the unconscious Keene out of the trunk and down to the river. Keene then woke up and started beating on Glass. Glass was on the ground and it was then that Thompson shot Keene and Glass then grabbed the gun and also shot Keene. Then the two of them put the body in the rive.

By Thompson's account of the events the last time Mann had any contact with Keene was at the Brown's house when Keene was unconscious. Contradicting testimony from other witnesses tells us that Keene, knowing he was going to be killed, asked Mann to take care of his children and that Mann retrieved some personal effects, a lighter and pocket knife, from Keene's body which he gave to his sister later. The implication is that these two events took place at the death scene contrary to Thompson's testimony. Thompson claimed, even though a shot had been fired at Brown's, that Mann did not know he was armed until he pulled the gun on him when they were back on the highway headed for the second stop.

This was not the first time a member of Vickie Keene's family had shot Charles Keene. Several years earlier, a brother-in-law had shot him because he thought Keene was going to kill her child. No charges were filed at that time.

Id., 749 P.2d at 1154-1156.

Other items of circumstantial evidence that tended to contradict Thompson's claim of the Defendant's innocence and indicate the Defendant's direct and willing participation in the murder are as follows:

1. The car that was used in the crime belonged to Danny Mann, the Defendant's brother, and Thompson "guessed" that the Defendant had the keys to this vehicle (Tr. 382). Thompson and Bobby Glass did not place the blocks and chain in the car until after the

Defendant had suggested that they go "whoop" Keene, and until after Thompson had obtained the Defendant's permission to come along (Tr. 379-380). The block and chain were placed in the trunk of Danny Mann's car to which the Defendant had the keys (Tr. 382);

2. From the time the group left Dorothy Thompson's house until they arrived at the place on the river bank where the victim was murdered, the Defendant did all of the driving (Tr. 382, 387, 388, 397, 404, 405, 407);

3. When they arrived at the trailer in Amber, the Defendant knocked on the door of the trailer, told Charles Keene to get his clothes because they were going to let him out on the highway (Tr. 388);

4. The first place that the Defendant took Keene to was a bridge over the Washita River (Tr. 397-398), a place similar to the actual murder scene;

5. The Defendant participated in the victim's beating on Malcolm Brown's front porch (Tr. 399, lines 19-25; Tr. 201, lines 20-22). A stick was used during this beating and the victim was knocked out (Tr. 400, lines 1-3);

6. After the beating the victim's unconscious body was placed in the trunk of the car along with the concrete blocks and the chain (Tr. 382, 400). The Defendant had just driven the car from the bridge to Brown's house (Tr. 399, lines 19-21). Although Thompson testified that the Defendant opposed putting the victim in the trunk, Thompson did not testify that the Defendant was under any duress at this time (Tr. 400);

7. Shortly after the murder Benny McCarthy visited Dorothy Thompson's home and saw several people, including the Defendant, congregated in the kitchen. At that time McCarthy heard the Defendant telling Bobby Glass that they had to go back to the scene to make sure

that the body was not floating, and that they also had to get rid of the gun (Tr. 465, lines 16-25; Tr. 466, lines 107);

8. Charlotte Mann's testimony indicates that she was at the Thompson residence during this same time frame and saw the Defendant and the Co-Defendants, and the Defendant discussed the murder with her, telling her that Wayne Thompson had killed Charles Keene (Tr. 537, lines 17-25; Tr. 538, lines 1-13). However, Charlotte Mann did not indicate that the Defendant or anyone else told her that Wayne Thompson pulled a gun on the Defendant and forced him to drive to the scene of the murder (Tr. 535-539, 556-557). Bobby Glass' account of the murder to Benny McCarthy likewise contains no references to Wayne Thompson pulling a gun on the Defendant (Tr. 473-475);

9. The Defendant asked Benny McCarthy to sell the gun that was used in the murder (Tr. 475-478);

The evidence outlined above, along with photographs and other items of physical evidence, made up the bulk of the evidence presented by the State during the first stage of the trial. The Defendant was subsequently found guilty of Murder in the First Degree. The State then presented evidence to support the Bill of Particulars, which alleged that the murder was especially heinous, atrocious or cruel, and that there existed a probability that the Defendant would commit criminal acts that would constitute a continuing threat to society (O.R. 87). The State reincorporated all of the evidence that it had introduced during the first stage of the trial (Tr. 706), and recalled Charlotte Mann to identify certain notes that the Defendant had written in jail (Tr. 700, 705). These notes were addressed to Bobby Glass, and in one of them the Defendant asked Glass to give the version of events that William Wayne Thompson ultimately gave when he testified (State's Exhibits 36 and 36; Tr. 818, 819).

When the State rested, the defense called several character witnesses who testified essentially that the Defendant was a peaceable person who could be rehabilitated. At the conclusion of the second stage of the trial, the jury found that the murder was heinous, atrocious or cruel, and sentenced the Defendant to death (Tr. 801).

SUMMARY OF ARGUMENT

The Defendant has failed to show that the introduction of the photographs of the murder victim, even coupled with the comments of the prosecutor, so infected the trial with unfairness as to make the resulting conviction and death sentence a denial of due process, or deprive the sentencing determination of the reliability required by the Eighth Amendment.

Likewise, the Defendant has failed to show that a jury instruction on diminished capacity manslaughter was required in this case, because the evidence presented at trial indicates that proof of the greater charge of first degree murder did not require the jury to find a disputed factual element which was not required for a conviction of the lesser-included offense.

Lastly, the Defendant's contention that the "especially heinous, atrocious or cruel" aggravating circumstance, as used in this case, was unconstitutionally vague is not supported by the record, which shows that here the application of this aggravating circumstance was limited by a jury instruction only to those cases where the murder of the victim was preceded by torture or serious physical abuse.

PROPOSITION I.

THE COLOR PHOTOGRAPHS OF THE VICTIM AND THE PROSECUTOR'S CONDUCT DID NOT RENDER THE TRIAL OR THE SENTENCING OF THE DEFENDANT SO FUNDAMENTALLY UNFAIR AS TO DENY DUE PROCESS OR CREATE A CONSTITUTIONALLY UNACCEPTABLE RISK THAT THE JURY IMPOSED THE DEATH PENALTY IN AN ARBITRARY AND CAPRICIOUS MANNER.

In his first proposition of error, the Defendant argues that the sentencing process was rendered fundamentally unfair and arbitrary by the jury's consideration of color photographs of the victim's body during the second stage of the trial. The Defendant also argues that the comments by the prosecutor during closing argument exacerbated the effect of the photographs and the jury's consideration of them. The record shows that only two photographs among several were found to be erroneous by the Oklahoma Court of Criminal Appeals. The erroneous photographs were State's Exhibits 10 and 11. State's Exhibit 10 shows the bullet hole in the victim's chest, while State's Exhibit 11 shows a bullet hold in the back of the victim's head. In addition to these photographs, a video tape showing the removal of the victim's body from the river was also shown to the jury. A photograph showing the victim's belt with his name carved on it (State's Exhibit 8), and a photograph depicting the concrete block tied to the victim's body with the chain (State's Exhibit 9) were also introduced. The Court of Criminal Appeals found that the videotape and State's Exhibits 8 and 9 were not unduly gruesome. See Mann v. State, Id. 749 P.2d at 1156.

Therefore, the Defendant's assignment of error deals with only two out of five exhibits showing the victim's body after it had been removed from the river, and even those photographs were not totally without value. The Court of Criminal Appeals found that these two photographs were in sharper focus than the video tape and were therefore inordinately gruesome, but this decision was basically an evidentiary judgment call on the part of the court. The

Court of Criminal Appeals also found that admission of these photographs was harmless error and did not affect the jury's verdict. Id. 744 P.2d at 1156. The Court made the same finding with regard to the same pictures in the companion case of Thompson v. State, 724 P.2d 780, 783 (Okla. Crim. App. 1986). Only in the remaining companion case of Jones v. State, 738 P.2d 525, 531 (Okla. Crim. App. 1987), where the evidence of guilt was much weaker, did the Court of Criminal Appeals find that the admission of these photographs, coupled with erroneous comments by the prosecutor and the erroneous admission of hearsay testimony, required reversal.

The Supreme Court has never ruled on the admissibility of allegedly gruesome photographs in a criminal trial. However, in Lisenba v. California, 314 U.S. 219, 227-29, 236, 62 S. Ct. 280, 66 L.Ed. 166 (1941), the Court rejected a contention that bringing two rattlesnakes into the courtroom prejudiced the defendant's rights. Later in Donnelly v. DeChristoforo, 416 U.S. 637, 642-643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), citing from Lisenba, the Court stated that not every trial error or infirmity which might call for the application of supervisory power constitutes a failure to observe fundamental fairness essential to the very concept of due process. The Court also indicated that when the specific guarantees of the Bill of Rights were not involved, constitutional error would not be found unless the error so infected the trial with unfairness as to make the resulting conviction a denial of due process. The Court recently held in two state criminal cases that the alleged trial errors did not meet this requirement. Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L.Ed.2d 144 (1986) (prosecutors closing arguments were not fundamentally unfair); and Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L.Ed.2d 525 (1986) (security force present in courtroom was not prejudicial). We contend that the introduction of the two photographs in question was likewise

not an error of sufficient magnitude to so infect the trial with unfairness as to make the resulting conviction a denial of due process.

While this Court has never ruled on the admissibility of photographs, other federal courts have. In Mercado v. Massey, 536 F.2d 107, 108 (5th Cir. 1976), the court rejected the petitioner's claim that the photographs of the deceased's body so inflamed the jury as to deny him a fair trial, holding that the "admissibility of these photographs. . . was an evidentiary question for the state trial judge." The court, citing Lisenba v. California, 314 U.S. at 227-28, acknowledged that "[f]ederal courts do not sit to review state evidentiary questions". 536 F.2d at 108.

Later, in Evans v. Thigpen, 809 F.2d 239, 242 (5th Cir. 1987), rehearing denied 814 F.2d 658, stay denied, certiorari denied, 107 S. Ct. 3278 (1987), the Fifth Circuit again rejected an allegation of error involving color slides of a victim's body, and held that in reviewing state evidentiary rulings, the court's role was limited to determining whether a trial judge's error was so extreme that it constituted denial of fundamental fairness. See also Godfrey v. Francis, 613 F. Supp. 747, 761 (N.D. Ga. 1985).

Regarding the Defendant's contention that the admission of the photographs violated his rights regarding the imposition of punishment, Oklahoma submits that the exhibits had no crucial or significant impact upon a finding of the aggravating circumstance that the murder was especially heinous, atrocious or cruel.

In the present case, the Oklahoma Court of Criminal Appeals found the evidence sufficient to overcome any prejudice caused by the admission of the photographs in question. Mann v. State, Id., 749 P.2d at 1156. A review of the facts set forth earlier in this brief show that this finding is obviously accurate.

The jury instruction defining this aggravating circumstance read in pertinent part as follows:

> The phrase, "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

[Emphasis added.] (O.R. 616).

The evidence of serious physical abuse in this case is overwhelming. A subsequent autopsy of the body revealed that death was caused by gunshot wounds to the head and the chest. The victim also incurred serious knife wounds. His throat had been cut, and he had received two knife wounds in his chest and abdomen. There was a small cut on the right side of his head. In addition, his right leg had been broken below the knee (Tr. 596-97). The medical examiner concluded that Charles Keene was alive when his leg was broken and when his throat and chest were cut (Tr. 610).

Considering the evidence of serious physical abuse in this case, Oklahoma contends that the admission of the photographs did not prevent the petitioner from having a fundamentally fair trial at either stage.

Further evidence that the photographs did not unfairly impassion the jury is the fact that the jury found the existence of only one of the two aggravating circumstances instructed by the court (O.R. 615; Tr. 801). Since the jury declined to find that the Defendant had the propensity to commit criminal acts of violence that would constitute a continuing threat to society, it can hardly be argued that the photographs caused the jury to act irresponsibly in this case.

The Defendant is also arguing that he was unduly prejudiced by the prosecutor's closing argument. In reviewing these assignments of error on direct appeal, the Court of Appeals found that evidence of guilt was sufficient to overcome the allegedly improper arguments made in the course of both the first and second stages of the trial. The

Court of Appeals also noted that in many of these instances the trial court sustained defense counsel's objections and admonished the jury to disregard the comments. Mann v. State, supra, 749 P.2d at 1159, 1160.

In Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L.Ed.2d 144 (1986), this Court dealt with an allegation that the prosecutor's closing argument rendered Darden's conviction for murder fundamentally unfair and deprived the sentencing determination of the reliability that the Eighth Amendment requires. A review of the prosecutor's arguments in that case, which included comments to the effect that Darden should not be allowed out of his cell unless he was leashed, and that the prosecutor wished that someone had blown Darden's head off in the course of the criminal episode in question, indicates that the prosecutor's statements were at least as prejudicial as the comments in the case at issue, if not worse. Id. 477 U.S. at 178-180, 106 S. Ct at 2471-72, footnotes 9-12.

Citing Donnelly v. DeChristoforo, supra, the court held that "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Applying this standard, the Court then determined that the prosecutor's comments had not deprived Darden of a fair trial. Id. 477 U.S. at 181, 106 S. Ct. at 2472.

In his Petition for Certiorari, the Defendant cites the following statement as an attempt by the prosecutor to invoke societal alarm, to-wit:

> Have you ever wanted to stand up and say, that's enough? Have you ever been in a position in your life where you've looked at what somebody has done and what they've done wrong to one or more other people, and say, that's enough? In this particular case, the evidence that you've heard is that Anthony Wayne Mann, participant in the torture, murder of Charles Keene. That's enough.

(Tr. 747).

The Defendant also complains regarding the prosecutor's comment that the Defendant was "trying to play the game to beat the system again." (Tr. 769). These comments and others tend to relate to the second aggravating circumstance set forth in the Bill of Particulars, which was that there existed a probability that the Defendant would commit violent acts in the future (O.R. 87, 615). However, as we have previously noted, the jury did not find this aggravating circumstance. The absence of such a finding by the jury strongly refutes the Defendant's claim that the prosecutor's arguments rendered the sentencing process unreliable. We fail to understand how the jurors could have been so inflamed by the prosecutor's arguments that they could not rationally arrive at a sentence of death, while at the same time retaining their ability to reject aggravating circumstances that they apparently concluded were not proven. Of course there was plenty of evidence to support the jury's finding that the murder was heinous, atrocious or cruel because of the serious physical abuse inflicted on the victim, and accordingly the jury did not have to be impassioned in order to find that aggravating circumstance.

Pursuant to these facts we contend that neither the photographs of the victim's body nor the comments of the prosecutor so infected the trial with unfairness as to the make the resulting conviction a denial of due process. Furthermore, for this Court to engage the type of in-depth review now suggested by the Defendant would require the Court to abandon its present narrow standard of review and instead exercise the broad supervisory powers which it has heretofore refused to employ regarding matters of this kind. Therefore, we respectfully ask the Court to decline the Defendant's invitation to expand the scope of its review of these issues.

PROPOSITION II.

THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY ON THE ELEMENTS AND PUNISHMENT FOR THE OFFENSE OF MANSLAUGHTER IN THE FIRST DEGREE.

In his second assignment of error the Defendant argues that the trial court erred by failing to given an instruction on first degree diminished capacity manslaughter. At trial the Defendant did not request an instruction on this theory of manslaughter. Rather he requested an instruction on heat-of-passion manslaughter (Tr. 632-33, O.R. 583-84). On his direct appeal, and apparently now in his petition for a writ of certiorari, the Defendant is arguing that the trial court should have given the instruction on diminished capacity manslaughter on its own motion.

In his Petition the Defendant sets forth excerpts from co-Defendant Thompson's testimony, and argues that this testimony should have necessitated a diminished capacity manslaughter instruction because it showed that the Defendant had been drinking and taking drugs. However, in Oklahoma, the mere fact that an accused has been drinking does not in and of itself entitle him to an instruction on diminished capacity manslaughter. In this State the law has also long been that voluntary intoxication will not prevent an unlawful homicide from being murder if the defendant was able to form a design to effect death. 21 O.S. 1981, § 704; Jones v. State, 648 P.2d 1251, 1254 (Okla. Crim. App. 1982); Morris v. Territory, 1 Okl. Cr. 617, 99 P. 760, 766 (1909). In fact, voluntary intoxication will not suffice even to reduce the homicide from murder to first degree manslaughter unless the state of intoxication is of such a character and extent as to render the defendant incapable of entertaining or forming a design to effect death. Johnson v. State, 621 P.2d 1162, 1164 (Okla. Crim. App. 1980); Skeen v. State, 61 Okl. Cr. 188, 666 P.2d 1106, 1111 (1937). The Oklahoma Court of Criminal Appeals has recently restated this rule in Brogie v. State, 695 P.2d 538, 546 (Okla. Crim. App. 1985), wherein the

Court ruled that where involuntary intoxication is raised as an affirmative defense, the defendant must introduce sufficient evidence to raise a reasonable doubt as to his ability to form the requisite intent. In that case the court found that because of a lack of such evidence, the trial court did not err in failing to give an instruction on first degree manslaughter.

The Oklahoma Court of Criminal Appeals found that a careful review of Thompson's testimony did not support the Defendant's contention that he was intoxicated beyond a point where he was capable of forming the intent required to commit first degree murder. Mann v. State, Id., 749 P.2d at 1156-57. The record supports the Court's finding. Other parts of Thompson's testimony, aside from those portions cited by the Defendant, indicate that the Defendant's mind was not so clouded by alcohol or drugs that he could not thoroughly appreciate what was happening around him.

For instance, even at Malcolm Brown's house, the scene of the victim's first beating, Thompson has the Defendant trying to persuade him and Bobby Glass not to put the victim in the trunk (Tr. 400). Thompson testified that shortly thereafter the Defendant was concerned enough about Charles Keene to stop the car for the express purpose letting Keene out of the trunk. It was at this point that Thompson allegedly pulled the gun on the Defendant and demanded that they keep going (Tr. 404). Thompson contended that later at the river the Defendant refused to help him and Glass as they removed Keene from the car. Thompson stated that the Defendant asked them if they knew what they were doing, and when they replied in the affirmative, the Defendant said, "You all know that it's murder" (Tr. 405). Then the Defendant walked away because he did not want to take part in the killing (Tr. 405).

These are not the acts of a man who is so intoxicated that he cannot form the intent to kill. This testimony

indicates that regardless of how intoxicated he may have been earlier that evening, the Defendant was quite lucid at the time of the crime. Of course, if believed, this testimony also indicates that the Defendant is innocent of any degree of homicide. Taken in its entirety, we contend that the testimony of William Wayne Thompson does not constitute evidence that the Defendant participated in the homicide in such a state of intoxication that he could not form the intent to kill.

Nor is there any other evidence in the record supporting an instruction on a lesser degree of homicide. The only other testifying witnesses who were around the Defendant that night were Benny McCarthy and Charlotte Mann. During the early morning hours of January 23, 1983, McCarthy saw the Defendant with Dorothy Thompson, Bobby Glass, and a girl named Charlesetta in Dorothy Thompson's kitchen. At that time, the Defendant was discussing the need to get rid of the gun and to check on the body to make sure it was not floating. McCarthy did not say anything about the Defendant appearing to be drunk even though this discussion must have been held only shortly after the murder. He did say that the Defendant and Bobby Glass did not look very happy (Tr. 464-66).

Charlotte Mann likewise testified that she saw the Defendant at his home during the early morning hours of January 23, 1983. She has the Defendant quite lucidly relating to her the events of the murder, with Wayne Thompson being the one who actually killed the victim. During this account, the Defendant failed to mention that Wayne Thompson had forced him to drive to the river bank at gun point (Tr. 537-38). We have been unable to find any passage in her testimony in which she said that the Defendant appeared to be intoxicated or under the influence of any drug.

Vickie Keene saw the Defendant later that morning while he was still in bed at the little house. The Defendant told

her that she would not have to worry about Charles anymore, and gave her Charles' knife and cigarette lighter (Tr. 509-10). At the time he gave her the knife and the lighter he said, "This is all he had on him so I took it from him" (Tr. 51). The Defendant also quoted Charles' last words to Vickie, those being "Take care of the boys and raise them right" (Tr. 522-23). In making these statements the Defendant displayed a remarkable memory for one who a few hours before was supposedly so drunk that he could not form the intent to kill.

In Sansone v. United States, 380 U.S. 343, 85 S. Ct. 1004, 13 L.Ed.2d 882 (1965), the Supreme Court discussed the general principles controlling whether or not an instruction on a lesser included offense should be given in a particular case. The Court stated as follows:

> The basic principles controlling whether or not a lesser-included offense charged should be given in a particular case have been settled by this Court. Rule 31(c) of the Federal Rules of Criminal Procedure provides in relevant part, that the "defendant may be found guilty of an offense necessarily included in the offense charged." Thus, "[i]n a case where some of the elements of the crime charged themselves constituted a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense." Berra v. United States, supra, at 134, 76 S.Ct. at 688. See Stevenson v. United States, 162 U.S. 313, 16 S.Ct. 839, 49 L.Ed. 980. But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. Berra v. United States, supra; Sparf v. United States, 156 U.S. 51, 63-64, 15 S.Ct. 273, 277-278, 39 L.Ed. 343. In other words, the lesser included offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. Berra v. United States, supra; Sparf v. United States, supra, 165 U.S. at 63-64, 15 S.Ct. at 277-278. We now apply the principles declared in these cases to the instant case.

(Emphasis added.) Id. 380 U.S. at 349-50, 85 S. Ct. at 1009 13 L.Ed.2d at 887-88. In that case the Supreme Court ultimately determined that the petitioner was not entitled to an instruction on the lesser included offense that he had requested. The Court's reasoning was that there were no disputed issues of fact which would justify instructing the jury that it could find that the petitioner had committed all of the elements of the proposed lesser included offense without having committed the offense charged. Id. 380 U.S. at 354-55, 85 S. Ct. at 1011-12, 13 L.Ed.2d at 890.

It is our contention that in the case at issue there was no disputed issue of fact which would have allowed the jury to have found all of the elements for diminished capacity manslaughter without at the same time finding all of the elements necessary for a conviction for first degree murder. The fact issue which is supposedly in dispute concerns the Defendant's ability to form the intent to commit first degree murder. Yet Co-Defendant Thompson's testimony actually indicates that there was no real fact question on this issue. We will not regurgitate all of our fact arguments heretofore made, however, there is one portion of Thompson's testimony which is particularly significant. During his direct examination, Mr. Thompson stated:

> Well, we drove on out there a little ways and there's the river bridge out there. I asked Tony--well, I told Tony to pull under the bridge and there's a little road that goes off down the side and curves around like that, and it was dark, and he did hit the gate, or the fence--gate--I'm not sure which. I believe it was the gate. He did hit the gate but we went on down under the bridge until I told him to stop and we got out and Tony said, well, you know, I asked him if he'd help us. He said he wouldn't. And he asked me if I knew what--he asked me and Bobby both if we knew what we was doing and we just said yeah. You know, he said you all know it's murder. We said yeah and he walked back up to by where he hit the fence to see what he did to it. . . .

(Tr. 405.)

We do not see how this testimony is compatible with the assertion that the Defendant was so drunk that he could not form the intent to kill. Under this testimony the Defendant knew that a murder was about to take place and chose not to participate in it. Thompson had previously testified that shortly before they arrived at the scene of the murder he had pulled gun on the Defendant and demanded that the Defendant take them to that location (Tr. 404-05). Accordingly, the Defendant's participation in the murder was the real fact issue in dispute, not his ability to form the intent to kill. The issue of the Defendant's participation was covered by the trial court's instructions (O.R. 598). We therefore submit that under Oklahoma law there is no disputed issue of fact that would have justified an instruction on the lesser included offense of diminished capacity manslaughter. See Brogie v. State, 695 P.2d 538, 546 (Okla. Crim. App. 1985). Therefore, we respectfully urge this Court to decline the Defendant's request to review this issue.

PROPOSITION III.

THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AS USED IN THIS CASE, WAS SUFFICIENTLY NARROW TO PROVIDE THE JURY WITH A PRINCIPLED WAY TO DISTINGUISH THE CLASS OF MURDERERS ENCOMPASSED BY THIS AGGRAVATING CIRCUMSTANCE FROM THOSE THAT ARE NOT.

In Proposition III of his Petition the Defendant argues that the aforesaid aggravating circumstance was constitutionally invalid because it fails to adequately narrow the group of persons to which it is applicable and thereby leaves the jury free to apply the circumstance to whomever it chooses. To support his contention the Defendant cites Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987). Recently this Court has held that this aggravating circumstance, as utilized in Cartwright v. State, 708 P.2d 592 (1985) was indeed too vague to meet Eighth Amendment

standards. Maynard v. Cartwright, 56 U.S. USLW 4501 (June 6, 1988).

However, in the case at issue the trial court did not use the same jury instruction to define the especially heinous, atrocious, or cruel aggravating circumstance that was used in Cartwright v. State, Id. In the case at issue the following instruction was used, to-wit:

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

(Emphasis added.) (O.R. 616.)

The last paragraph of this instruction limits the application of the aggravating circumstance to those cases where the victim's death was preceded by torture or serious physical abuse. This limitation was not included in the jury instruction used in Cartwright v. State, Id.

The Oklahoma Court of Criminal Appeals added the torture or serious physical abuse limitation to this aggravating circumstance as a matter of law even before this Court handed down its decision in Maynard v. Cartwright, Id. See, Stouffer v. State, 742 P.2d 562, 564 (1987). In the case at issue the Oklahoma Court of Criminal Appeals reviewed the sufficiency of the evidence to support the jury's finding of this aggravating circumstance under the definition adopted in Stouffer v. State, Id., and found that the evidence supported the jury's finding. Mann v. State, Id., 749 P.2d at 1160-61. In its recent opinion in Maynard v. Cartwright, Id., this Court refused to hold that this aggravating circumstance was limited only to cases involving torture or serious physical abuse, and thus implied that this definition

was certainly adequate and was narrow enough to be expanded upon.

We argue that the heinous, atrocious, or cruel aggravating circumstance, with its limitation to cases involving torture or serious physical abuse, is sufficient to meet constitutional requirements for clarity. Whether a murder victim has been tortured or subjected to serious physical abuse at time of the murder are fairly objective questions which a fact finder in our system ought to be able to answer in a nonarbitrary manner. While arguably there are degrees of physical abuse which could lead to difficult fact issues in some cases, such difficulties are commonplace in our system and should not be any harder to resolve than other fact fact questions that courts and juries must constantly resolve in criminal cases. Here the jury's discretion is at least limited to the resolution of a particular fact question, with the result that the jury is not left free to decide for itself what the aggravating circumstance means. In this regard, we contend that the heinous, atrocious, or cruel aggravating circumstance is no more vague than the aggravating circumstance dealing with Defendant's propensity to commit violent acts in the future, which has been held by this Court to be constitutionally valid. See Jurek v. Texas, 428 U.S. 262, 274-76, 96 S. Ct. 2950, 49 L.Ed.2d 929, 940-41 (1976), see also Barefoot v. Estelle, 463 U.S. 880, 846-903, 77 L.Ed.2d 1909, 1106-1110, 103 S. Ct. 3383 (1983).

We submit that in the case at issue the definition of the heinous, atrocious, or cruel aggravating circumstance has already been narrowed as much as is reasonably possible, and is clearly sufficient to meet the requirements of Godfrey v. Georgia, 446 U.S. 420, 433 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); and Maynard v. Cartwright, Id. Therefore, we respectfully request that this Court decline the Defendant's petition to review this issue.

CONCLUSION

For reasons set out above, we respectfully suggest that the decision of the court below comports with applicable opinions of this Court and that there is no compelling reason to grant certiorari to review this decision. We respectfully ask the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT H. HENRY
ATTORNEY GENERAL OF OKLAHOMA

Robert A. Nance

ROBERT A. NANCE*
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

William H. Luker

WILLIAM H. LUKER
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

*Cousel of Record

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